No. 06-772

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

OLIVIA RUX, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

NELSON M. JONES, III
NICHOLAS & JONES, P.A.
440 Louisiana Street, Suite 475
Houston, Texas 77002
(713) 224-5323

MARY JANE HALL
KAUFMAN & CANOLES, P.A.
150 West Main Street, Suite 2100
Norfolk, VA 23510
(757) 624-3130

ANDREW C. HALL
Counsel of Record
MARK E. STEINER
HALL, LAMB AND HALL, P.A.
1428 Brickell Avenue, Penthouse
Miami, Florida 33131-3491
(305) 374-5030

JAMES COOPER-HILL
320 Olympic
Rockport, Texas 78382
(361) 729-3923

Counsel for Respondents

206132

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider abandoning its holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and impose the heightened pleading standard precluded by that case and by the plain language of Fed.R.Civ.P. 8(a) and 9(b) merely because Petitioner is a foreign sovereign state and jurisdiction is under the Foreign Sovereign Immunities Act?

2. Whether this Court should grant certiorari to consider if the provisions of §1605(a)(7) creating an exception to sovereign immunity for terrorist acts caused by foreign sovereign states who provide material support to terrorists require plaintiffs to go beyond Rule 8(a)(2) and plead a particularized statement in evidentiary detail which would demonstrate an unbroken causal chain of events that conclusively establishes both jurisdiction and ultimate liability on the part of the foreign sovereign.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
PROCEDURAL HISTORY	5
REASONS FOR DENYING THE PETITION	7

I. Sudan Has Not Presented Any Reason For This Court To Grant Review And Consider Abandoning Its 1993 Holding In *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit,* 507 U.S. 163 (1993), And Effectively Amending Rules 8(a) And 9(b) To Require A Heightened Pleading Standard In A Case Involving The Terrorism Exception To Sovereign Immunity Under The Foreign Sovereign Immunities Act 7

II. Sudan Has Not Presented Any Reason For This Court To Grant Review And Consider The Provisions Of § 1605(a)(7), Creating An Exception To Sovereign Immunity For Terrorist Acts Caused By Foreign Sovereign States Who Provide Material Support To Terrorists, And Determine That Despite The Language Of The Statute Which Does Not

Contents

Page

Require Plaintiffs To Plead A Detailed And Particularized Statement Of Evidentiary Facts Which Would Demonstrate An Unbroken Causal Chain Of Events That Conclusively Establishes Both Jurisdiction And Ultimate Liability On The Part Of The Foreign Sovereign, Such An Allegation Should Be Required. 12

III. Sudan's Exposure To Litigation Is Based Upon Its Own Strategic Decision And It Should Not Be Allowed To Complain About The Effects Of Its Decision In This Petition For Certiorari. 13

IV. There Is No Conflict With Decisions Of This Court Or Any Other Circuit Court Because No Court Has Required Detailed And Particular Pleadings That Establish Direct Causation In Order To Establish Subject Matter Jurisdiction. 17

V. This Court May Take Judicial Notice Of Subsequent Events At The Trial Level Which Make Review Inappropriate. 21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

Cases

Argentine Republic v. Amerada-Hess,
488 U.S. 428 (1989) 9

Arriba Ltd. v. Petroleos Mexicanos,
962 F2d 528 (5th Cir. 1992) 14, 16

Bell v. Hood,
327 U.S. 678 (1946) 20

Browning v. Clinton,
292 F. 3d 235 (D.C. Cir. 2002) 17

Bryant v. Carleson,
444 F.2d 353 (9th Cir. 1971) 6, 21

Conley v. Gibson,
355 U.S. 41, 78 S.Ct. 99,
2 L.Ed.2d 80 (1957) 7, 8, 9

Dominican Republic v. Meadows,
1987 WL 955578 (1987) 10

Federal Democratic Republic of Ethiopia v. Nemariam,
2003 WL 22428585 (2003) 10

First National City Bank v. Banco Para El Comercio Exterior de Cuba,
462 U.S. 611, 103 S.Ct. 2591,
77 L.Ed.2d 46 (1983) 15

Cited Authorities

Page

Foremost-McKesson, Inc. v. Islamic Republic of Iran,
905 F.2d 438 (D.C. Cir. 1990) 17

Islamic Republic of Iran v. McKesson,
2002 WL 32134799 (2002) 10

Khalili v. Pan Am Petroleum Corp.,
49 F.R.D. 22 (D.Alaska 1969) 22

Kilburn v. Socialist People's Libyan Arab Jamahiriya,
376 F. 3d 1123 (D.C. Cir 2004) 13, 18, 19

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,
507 U.S. 163 (1993) .....i, 7, 8, 9, 12

McGonigle v. Baxter,
27 F.R.D. 504 (E.D.Pa. 1961) 22

Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,
126 S.Ct. 1193 (2006) 9

Oroco Marine, Inc. v. National Marine Service, Inc.,
71 F.R.D. 220 (S.D.Tex. 1976) 23

Owens v. Republic of Sudan,
412 F.Supp.2d 99 (D.D.C. 2006) 16, 18, 19

Palestine Liberation Organization v. Ungar,
2005 WL 2708405 (2005) 10

Cited Authorities

Page

Papasan v. Allain,
478 U.S. 265, 106 S.Ct. 2932,
92 L.Ed.2d 209 (1986) 19

Phoenix Consulting Inc. v. Republic of Angola,
216 F.3d 36 (D.C.Cir. 2000) 13, 14, 16

Price v. Socialist People's Libyan Arab Jamahiriya (Price II),
294 F.3d 82 (D.C. Cir. 2002) 17, 19

Princz v. Federal Republic of Germany,
26 F.3d 1166 (D.C.Cir. 1994) 16

Republic of Argentina v. Siderman de Blake,
1992 WL 12073555 (1992) 10

Republic of Argentina v. Weltover,
504 U.S. 607 (1992) 9, 12

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 9

Republic of Congo v. Af-Cap, Inc.,
2005 WL 240654 (2005) 10

Republic of Philippines v. Walter Fuller Aircraft Sales, Inc.,
1995 WL 17035393 (1995) 10

Robinson v. Government of Malaysia,
269 F.3d 133 (2d Cir. 2001) 13, 20

Cited Authorities

	Page
Rothenberg v. Security Management Co., Inc., 667 F.2d 958 (11th Cir. 1982)	6, 21
Rux v. Republic of Sudan, 2005 WL 2086202 (E.D.Va. 2005)	5, 13
Rux v. Republic of Sudan, 461 F.3d 461 (4th Cir. 2006)	12, 16, 19
Saudi Arabia v. Nelson, 507 U.S. 349 (1993)	9
Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976)	21
Sinclair v. Kleindienst, 711 F. 2d 291 (D.C. Cir. 1983)	17
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998)	20, 21
Swierkiewicz v. Sorema, 534 U.S. 506 (2002)	8
Taiwan v. Sun, 2000 WL 34000227 (2000)	10
U.S. v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup, 583 F.2d 942 (7th Cir. 1978)	21

Cited Authorities

Page

Statutes and Rules of Procedure

28 U.S.C. § 1605(a)(2) 13

28 U.S.C. § 1605(a)(7) ..... *passim*

28 U.S.C. § 1606 ..... 1, 11

28 U.S.C. § 1983 8

Fed.R.Civ.P. 8(a) ..... i, 7, 11

Fed.R.Civ.P. 9(b) ..... i, 7, 9, 11

Fed.R.Civ.P. 12(b)(6) 18

Fed.R.Civ.P 36 6

Fed.R.Civ.P. 36(a) 22

Fed.R.Civ.P. 36(b) 21

Fed.R.Evid. 201(f) 6, 21

Respondents respectfully submit this brief in opposition to Petitioner Republic of Sudan's ("Sudan") petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit.

STATUTORY PROVISIONS INVOLVED

Sudan correctly indicates the statutory provisions involved. Respondents submit that in addition to those statutory provisions indicated by Sudan, one additional statutory provision is involved, 28 U.S.C. § 1606.

STATEMENT OF THE CASE

Plaintiffs, the surviving family members of the seventeen American sailors who died in the bombing of the U.S.S. Cole, filed this action against Sudan seeking to recover damages arising from this state sponsored act of terrorism. The U.S.S. Cole was bombed by Al Qaeda, a terrorist organization, while berthed in Aden Harbor, Yemen. The bombing occurred because Sudan provided continuous support to Al Qaeda which directly facilitated this terrorist act.

The Cole bombing was the result of an extended plot that commenced in Sudan in 1992 when Osama bin Laden, while in Sudan and being given safe harbor by it, issued a Fatwah directing an Al Qaeda attack on an American military asset in Yemen. Over the following eight years, planning, safe haven, diplomatic assistance, money laundering, materials and supplies were provided by Sudan to Al Qaeda. The assistance came together and culminated in the bombing of the U.S.S. Cole on October 12, 2000. Without that assistance, the bombing would not have occurred.[1]

---

[1] The first attempted attack on an American warship was the failed attempt to bomb the U.S.S. Sullivans in the same harbor in (Cont'd)

Respondents brought this case against the Petitioner, Republic of Sudan ("Sudan"), under 28 U.S.C. § 1605(a)(7), the "terrorism exception" of the Foreign Sovereign Immunities Act (the "FSIA"). The section provides an exception to sovereign immunity where:

> money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency .. .

The Complaint specifically alleges that Sudan provided extensive material support to Al Qaeda in the years preceding the U.S.S. Cole bombing which proximately caused the bombing. The Complaint further alleges that without Sudan's support, Al Qaeda would not otherwise have been capable of carrying out the attack.

The Complaint alleged that the following acts or policies of Sudan constituted material support which proximately caused this terrorist act:

- Officials, employees or agents knowingly and willfully used funds and other assets of Sudan to provide material support and resources to Osama bin Laden and Al Qaeda, the

---

(Cont'd)

January of 2000. The second attempt was successful, against the U.S.S. Cole on October 12, 2000, resulting in the deaths of 17 American sailors.

perpetrators of the bombing of the U.S.S. Cole, while acting in the scope of their office, employment or agency;

- Sudan provided a safe haven for Osama bin Laden between the years of 1991-1996;

- Sudan provided safe haven for other Al Qaeda members and operatives, including the perpetrators of the bombing of the U.S.S. Cole, through 2001;

- Sudan provided material support and resources to the actual perpetrators of the bombing of the U.S.S. Cole;

- Sudan allowed Al Qaeda to maintain and operate terrorist training camps within Sudan's borders for the purpose of training terrorists how to manufacture bombs and explosives;

- Sudan allowed members of Al Qaeda, including the perpetrators of the bombing of the U.S.S. Cole, free passage into and out of Sudan without customs or immigration inspections;

- Sudan allowed Al Qaeda to ship explosives in Sudanese diplomatic pouches;

- Sudan allowed Al Qaeda operative Jamal Ahmed al-Fadl to ship four crates of explosives to Yemen, the site of the bombing of the U.S.S. Cole:

- Sudan provided diplomatic credentials and passports to members of Al Qaeda who are not Sudanese citizens;

- Sudanese President Omar Bashir authorized the sheltering of Al Qaeda members in Sudan and gave Al Qaeda special authority to avoid paying taxes and duties ordinarily due;

- Sudan undertook to establish and jointly own several commercial establishments with Osama bin Laden and Al Qaeda, including the Al Shamal Islamic Bank, the Wadi al-Aqiq Trading Company, and the Gum Arabic Company, Ltd., which provided vehicles for the passage of money and material to Al Qaeda and the perpetrators of the bombing of the U.S.S. Cole;

- Sudan failed to comply with U.N. Security Council Resolutions 1044, 1054, and 1096, passed in 1996, and continued to harbor terrorists including Al Qaeda;

- Sudan issued a public apology in May, 2003 through its minister of foreign affairs, Mustafa Osman Ismail, aired on CSPAN, for the prior harboring and assisting of terrorists including but not limited to Al Qaeda and Osama bin Laden;

Amended Complaint at ¶26-30.

PROCEDURAL HISTORY

Respondents filed their original Complaint on July 16, 2004. It was amended on August 10, 2004, September 17, 2004, November 12, 2004 and September 8, 2006. Respondents effected service of process on Sudan in December, 2004. Sudan failed to answer within the prescribed time. The Clerk of Court entered a default against Sudan. Respondents moved for default judgment.

Before the date of the evidentiary hearing on Respondents' motion, Sudan filed its Motion to Vacate Entry of Default and Cancel Evidentiary Hearing. In that motion, Sudan asserted the District Court lacked personal jurisdiction because of insufficient process and service of process. After a hearing on Sudan's motion, the District Court vacated the default with Respondents' consent. The District Court also held that Sudan waived its right to contest personal jurisdiction and Respondents effected proper service on Sudan.

When Sudan presented the FSIA jurisdiction issue to the District Court, the Court gave Sudan two choices in its attack on subject matter jurisdiction: either it could attack the facts upon which jurisdiction was asserted, which required Sudan to submit to limited fact discovery on jurisdiction, or it could limit its challenge the sufficiency of the jurisdictional allegations made in the pleadings, in which case allegations in the complaint would be taken as true. *Rux v. Republic of Sudan*, 2005 WL 2086202 at *4 (E.D.Va. 2005). For strategic reasons and in a desire to keep its internal information a secret, Sudan chose to challenge only the sufficiency of the allegations contained in the pleadings, thereby foreclosing the possibility of jurisdictional discovery.[2] Sudan filed its

[2] Following the denial of Sudan's motion to dismiss, Sudan has refused all efforts to obtain discovery. In addition, it has not (Cont'd)

Motion to Dismiss Plaintiffs' Amended Complaint attacking the pleadings only on August 3, 2005.

On August 26, 2005, the District Court entered its order denying Sudan's motion to dismiss. In that order, the District Court held that Plaintiffs had pled sufficient facts to support subject matter jurisdiction under § 1605(a)(7).

On appeal to the Fourth Circuit, Sudan argued that the District Court erred in denying its motion to dismiss for lack of subject matter jurisdiction under FSIA, an issue that is subject to interlocutory review. The Fourth Circuit affirmed the District Court's decision on subject matter jurisdiction and determined that the Respondents had sufficiently alleged a basis for jurisdiction. Sudan now petitions this Court to review the Fourth Circuit's ruling.

(Cont'd)
responded to detailed requests for admissions, which under Fed.R.Civ.P 36 conclusively establishes the detailed and unbroken chain of evidentiary facts which it now contends needed to be pled in the complaint. "Judicial notice may be taken at any stage of the proceeding." Fed.R.Ev. 201(f). This Court may take judicial notice on appeal of subsequent developments in this case at the trial level since the present petition was filed. *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971). "We are...free to take judicial notice of subsequent developments in cases that are a matter of public record and are relevant to the appeal." *Rothenberg v. Security Management Co., Inc.*, 667 F.2d 958, 961, n. 8 (11th Cir. 1982). This Court should take judicial notice of the fact that Sudan has refused all efforts to obtain discovery.

REASONS FOR DENYING THE PETITION

I. SUDAN HAS NOT PRESENTED ANY REASON FOR THIS COURT TO GRANT REVIEW AND CONSIDER ABANDONING ITS 1993 HOLDING IN *LEATHERMAN v. TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT,* 507 U.S. 163 (1993), AND EFFECTIVELY AMENDING RULES 8(a) AND 9(b) TO REQUIRE A HEIGHTENED PLEADING STANDARD IN A CASE INVOLVING THE TERRORISM EXCEPTION TO SOVEREIGN IMMUNITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

In 1993, this Court, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), a unanimous opinion on immunity, rejected any requirement for a heightened pleading standard regarding jurisdictional allegations to refute immunity when that standard was not set forth within the ambit of Rules 8(a) or 9(b) of the Federal Rules of Civil Procedure. The Court stated:

> "We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief'. In *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) we said in effect that the rule meant what it said:
>
> > '[T]he Federal Rules of Civil Procedure do not require a claimant to set out in

> detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' *Id.* at 47, 78 S.Ct. at 103 (footnote omitted).
>
> Rule 9(b) does impose a particularity requirement in two specific instances and provides that '[i]n all averments in fraud or mistake, the circumstances constituting fraud or mistake, shall be stated with particularity.' Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Espressio unius est exclusio alterius." Id.* at 168.

"Rule 8(a)'s simplified pleading standard *applies to all civil actions*, with limited exceptions." *Swierkiewicz v. Sorema*, 534 U.S. 506, 513 (2002) (emphasis added). This Court has interpreted this Rule to mean that pleading with particularity is not necessary.

Like claims against municipalities, claims against foreign sovereign states under the FSIA are not enumerated in Rule 9(b) which requires pleading with particularity. Therefore, the same principle enunciated in *Leatherman* applies here. Pleading to the level demanded by Sudan in this case is simply not required under the Federal Rules or the law of this Court. *See Swierkiewicz*, 534 U.S. at 513 (referring to *Leatherman, supra* in declining to apply heightened pleading requirements where the cause of action is not enumerated in

Rule 9(b)). Requiring a heightened pleading standard to complaints arising under § 1605(a)(7) "is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman*, 507 U.S. at 168.

Sudan has not asserted a single reason as to why this Court's 50 years of precedent (from *Conley* to *Leatherman*) should not remain in effect. As will be discussed below, there is no justification for Sudan's argument based on the fact that the Petitioner is a foreign sovereign or under the congressional history surrounding the enactment of the terrorist exception.

Of all the cases brought before this Court on petition for writ of certiorari involving a foreign sovereign state as a party, this case presents perhaps the most mundane and well-settled issue of law of all of them. Of approximately 23 petitions for certiorari involving foreign states and relating to the FSIA, this Court has deemed only 5 worthy of certiorari: *Argentine Republic v. Amerada-Hess*, 488 U.S. 428 (1989) (landmark decision declaring the FSIA as the sole basis for obtaining jurisdiction over a foreign state); *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (defining the scope of the "commercial activities" exception to the FSIA to include issuance of bonds); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (limiting "commercial activities" exception to exclude detention and torture of American employee recruited and hired in America by a sovereign not designated as a state sponsor of terrorism under FSIA); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (declaring that the FSIA could be applied to obtain jurisdiction over foreign states for acts taking place prior to passage of FSIA); and *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 126 S.Ct. 1193 (2006) (vacating decision that Ministry was "agent or instrumentality" of Iran within the meaning of the FSIA and remanding for

determination of whether it was an agent of the state or an integral part of the state itself).

The cases brought by foreign states that this Court has deemed unworthy of certiorari include: *Palestine Liberation Organization v. Ungar*, 2005 WL 2708405 (2005) (whether Palestine had achieved statehood or the requisite elements thereof in order to be entitled to sovereign immunity under the FSIA); *Republic of Congo v. Af-Cap, Inc.*, 2005 WL 240654 (2005) (whether foreign state's right to receive royalties from American company operating in the foreign state was property located in the United States so as to subject them to jurisdiction under the FSIA); *Federal Democratic Republic of Ethiopia v. Nemariam*, 2003 WL 22428585 (2003) (whether certain foreign proceedings qualify as adequate alternative forums under the doctrine of *forum non conveniens*); *Islamic Republic of Iran v. McKesson*, 2002 WL 32134799 (2002) (applicability of "commercial activities" and "direct effect" exceptions to FSIA to non-payment of dividends payable only in Iran); *Taiwan v. Sun*, 2000 WL 34000227 (2000) (whether "commercial activities" exception applied to negligence action where participant ultimately died in Taiwan during training program that Taiwan advertised in the United States); *Republic of Philippines v. Walter Fuller Aircraft Sales, Inc.*, 1995 WL 17035393 (1995) (raising due process concerns in contract interpretation case); *Republic of Argentina v. Siderman de Blake*, 1992 WL 12073555 (1992) (whether sovereign state waived immunity by requesting that California state court serve documents relating to criminal proceeding instituted against torture victim then living in the United States); *Dominican Republic v. Meadows*, 1987 WL 955578 (1987) (whether general contacts of foreign state could establish direct effect in the United States to establish jurisdiction over juridically separate entity).

Each of the petitions for certiorari cited above brought by a foreign sovereign state sought interpretations of the FSIA in unsettled and questionable circumstances. Nevertheless, certiorari was not granted. This case presents no such issue. Rather, this case involves a narrow and already settled question: does Rule 8(a) apply to a case where jurisdiction is based on the FSIA.

The pleading requirements under the FSIA are well-settled and unanimously agreed upon. They are no different from pleading requirements in almost all other cases, and are set forth squarely in Fed.R.Civ.P. Rule 8(a), with the only recognized exceptions set forth in Rule 9(b), where averments of fraud or mistake must be pled with particularity. Sudan's status as a foreign sovereign state does not entitle it to review on certiorari to this Court on a mundane and well settled issue of law.

The mere fact that Sudan is sovereign does not give it any further entitlement to review on certiorari than any other party. The very language of the Foreign Sovereign Immunities Act under 28 U.S.C. § 1606 provides that foreign sovereign is entitled to be treated in the same manner as any other party. Certainly that should apply to certiorari review as it does to the merits of this case.

II. SUDAN HAS NOT PRESENTED ANY REASON FOR THIS COURT TO GRANT REVIEW AND CONSIDER THE PROVISIONS OF § 1605(a)(7), CREATING AN EXCEPTION TO SOVEREIGN IMMUNITY FOR TERRORIST ACTS CAUSED BY FOREIGN SOVEREIGN STATES WHO PROVIDE MATERIAL SUPPORT TO TERRORISTS, AND DETERMINE THAT DESPITE THE LANGUAGE OF THE STATUTE WHICH DOES NOT REQUIRE PLAINTIFFS TO PLEAD A DETAILED AND PARTICULARIZED STATEMENT OF EVIDENTIARY FACTS WHICH WOULD DEMONSTRATE AN UNBROKEN CAUSAL CHAIN OF EVENTS THAT CONCLUSIVELY ESTABLISHES BOTH JURISDICTION AND ULTIMATE LIABILITY ON THE PART OF THE FOREIGN SOVEREIGN, SUCH AN ALLEGATION SHOULD BE REQUIRED.

Sudan, ignoring *Leatherman*, argues that the Fourth Circuit's decision in *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006), *relaxes* the jurisdictional pleading requirements of § 1605(a)(7). That assertion is not supported by the lower court's decision or the language of the statute.

The plain language of the terrorism exception to sovereign immunity codified by § 1605(a)(7) reveals no indication that claimants must plead jurisdiction with particularity. Furthermore, no heightened pleading is required for cases brought under other provisions of the FSIA. In fact, more restrictive standards have been rejected by this Court.

In *Republic of Argentina v. Weltover*, 504 U.S. 607, 617-618 (1992), this Court rejected the proposition that allegations to establish the commercial activity exception require more than the plain language of statute itself requires. In the same way that these further requirements

do not appear (and therefore are not included) in § 1605(a)(2), the requirements that Sudan seeks to create do not appear in § 1605(a)(7)[3], and therefore are not required in a complaint. The particularity that Sudan demands of Respondents' pleadings has no basis in the law and is not required.

III. SUDAN'S EXPOSURE TO LITIGATION IS BASED UPON ITS OWN STRATEGIC DECISION AND IT SHOULD NOT BE ALLOWED TO COMPLAIN ABOUT THE EFFECTS OF ITS DECISION IN THIS PETITION FOR CERTIORARI.

When Sudan presented the FSIA jurisdiction issue to the District Court, the Court gave Sudan two choices in its attack on subject matter jurisdiction: either it could attack the facts upon which jurisdiction was asserted, which required Sudan to submit to limited fact discovery on jurisdiction, or it could challenge the sufficiency of the jurisdictional allegations made in the pleadings, in which case allegations in the complaint would be taken as true. *Rux v. Republic of Sudan*, 2005 WL 2086202 at *4 (E.D.Va. 2005). *See also Robinson v. Government of Malaysia*, 269 F.3d 133 (2d Cir. 2001); *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36 (D.C.Cir. 2000). For its own strategic reasons and to keep its internal information secret, Sudan chose to challenge the sufficiency of the pleadings only.

---

[3] The lower courts have followed this same concept. In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F. 3d 1123, 1128 (D.C. Cir 2004), the Court discussed Libya's argument that §1605(a)(7) requires not only pleading of a causal connection, but also an allegation that the terrorist act complained of would not have occurred but for the state action. As the Court notes, "but for" simply does not appear in the text of §1605(a)(7), only the words "caused by" do. *Id.* No more restrictive standard may be read into that plain and unambiguous language.

Since Sudan chose not to challenge facts upon which Respondents rely in their complaint, they are taken as true and all reasonable inferences from those facts as alleged are drawn in Respondents' favor. *Phoenix Consulting*, 216 F.3d at 40.

Sudan argues that the Fourth Circuit's decision denied it the opportunity to challenge subject matter jurisdiction by introducing evidence of its own that shows jurisdiction is lacking. *Petition* at 16. This argument is clearly without merit. Sudan had the opportunity, when it first challenged subject matter jurisdiction, to either challenge on the legal sufficiency of the complaint, or on the factual basis for jurisdiction. *Phoenix Consulting*, 216 F.3d at 40. It is not the District Court or the Fourth Circuit's findings and decisions that prevented Sudan from entering evidence challenging the factual basis for jurisdiction. Its own strategic decision-making put Sudan in that position.

Sudan asserts that the holding in *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992), supports its argument that a more detailed pleading than required by the Court below is required before any discovery is permitted. This contention misstates the Court's holding. The Court simply held that the Plaintiff's allegations of "agency" were insufficient to establish the fact of an agency relationship when Pemex was intended to be outside that same relationship, and its "piercing the veil" allegations were insufficient to overcome the presumption of independence that Pemex enjoyed.[4] Contrary to the pleading in *Arriba*,

[4] In the lawsuit, Arriba accused Pemex of engaging in racketeering in Mexico as well as extortion under Texas law. Pemex sought to dismiss the claim as well as writs of garnishment issued in furtherance of two default judgment issued by a Texas state court, one on the merits and a second default judgment for breach of a settlement agreement. As to the garnishment issues, it was asserted that Pemex was "stripping the assets" of the union to prevent Arriba from enforcing its judgment.

(Cont'd)

Pemex is the national oil company of Mexico. As such, it is regarded as an instrumentality of the government of Mexico and a presumption of its juridical independence exists under this Court's 1983 decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627, 103 S.Ct. 2591, 2599-2600, 77 L.Ed.2d 46 (1983) ("Bancec"). Arriba, a Bahamian corporation, contended that it suffered damages from a failed contract between Arriba and an arm of Pemex's labor union, the Petroleum Workers Union of Mexico, Sindicado de Trabajadores Petroleros de la Republica Mexicana. In its motion to dismiss, Pemex asserted that its activities fell outside the commercial activities exception to the FSIA, and therefore its sovereign immunity was retained.

The contract in dispute was a 1984 agreement between several officials of the labor union and its private contracting arm, the Commission, and Arriba where the officials and the Commission agreed to supply residual, or "slop" oil at bargain prices without the need for a direct contract with Pemex. The complaint sought to include Pemex as a defendant based upon negotiations between Arriba's president and members of the labor union and its Commission, allegedly "persons who were acting as the agents and representatives" of Pemex.

Arriba, conceding that the agreement was structured to avoid direct dealing with Pemex or any other branch of the Mexican government, sought to bind Pemex based upon its contention that the union representative signing the contract and his associates should be considered Pemex "agents" by implication, and Pemex's activities were "inextricably integrated" with those of the union. The sole United States contact alleged was predicated upon allegations that the Commission was an agent or alter ego of the union and Pemex. Instrumentalities of foreign states are accorded a presumption of separate status, which may be overcome only when a corporate entity is so controlled by its owner that a principle/agent relationship exists. No such facts were pleaded. The Court considered an alternative, joint and several liability or tort respondeat superior liability. Arriba did not plead conspiracy or tort as a basis for jurisdiction. Further, Arriba could not rely on respondeat superior because the contract was outside the scope of the employment relationship with Pemex. Therefore the Court concluded that Arriba did not allege commercial activities by or on behalf of Pemex.

(Cont'd)

Respondents have alleged numerous specific facts which support jurisdiction under § 1605(a)(7).

Sudan has made the decision not to contest these factual allegations to avoid even limited discovery on the issue of jurisdiction. In deciding a motion to dismiss, plaintiffs' allegations are taken as true and those allegations are sufficient. Sudan was not subjected to premature discovery or the attendant burdens of litigation prior to a finding that immunity did not apply. Therefore, Sudan's reliance on *Arriba* is misplaced.

Having made the requisite pleading and because Sudan elected not to factually attack jurisdiction, sovereign immunity is an affirmative defense. The burden is on Sudan to demonstrate that sovereign immunity applies as this case proceeds below.[5]

(Cont'd)

Nothing in Arriba is similar to the issues in this case. Arriba's allegations were incomplete and insufficient. The same cannot be said in the instant case. Nothing in Arriba speaks to the requirement of a particularized pleading, only a coherent one that sets forth an exception to sovereign immunity.

[5] "In accordance with the restrictive view of sovereign immunity reflected in the FSIA, the defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Phoenix Consulting*, 216 F.3d at 40. *See also Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C.Cir. 1994)("It is the burden of the foreign sovereign in each case to establish its immunity by demonstrating that none of the exceptions is applicable"); *Owens v. Republic of Sudan*, 412 F.Supp.2d 99, 104 (D.D.C. 2006); *Rux v. Sudan*, 461 F.3d 461, 467 (4th Cir. 2006). Sudan decided not to provide any evidence to meet that burden. Based upon its own decision, it should not be allowed to complain about this result now.

IV. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT COURT BECAUSE NO COURT HAS REQUIRED DETAILED AND PARTICULAR PLEADINGS THAT ESTABLISH DIRECT CAUSATION IN ORDER TO ESTABLISH SUBJECT MATTER JURISDICTION.

There is no conflict among the lower courts. The decisions are uniform and require no more than what is pled here. Sudan challenged jurisdiction based solely on the allegations contained in the pleadings. The standard of specificity for this type of challenge was stated by the District of Columbia Circuit in *Price v. Socialist People's Libyan Arab Jamahiriya (Price II)*, 294 F.3d 82, 93 (D.C. Cir. 2002):

> When reviewing a plaintiff's unchallenged factual allegations to determine whether they are sufficient to deprive a foreign state defendant of sovereign immunity, we assume those allegations to be true." *Foremost-McKesson*, 905 F.2d at 440, n. 3. Thus where the defendant contests only the legal sufficiency of jurisdictional claims, the standard is similar to Rule 12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief. *See Browning v. Clinton*, 292 F.3d 235, 241-42 (D.C. Cir. 2002). ***Claimant need not set out all of the precise facts on which the claim is based in order to survive a motion to dismiss.*** *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983) (emphasis added).

In *Price II, supra*, the Court remanded for an amendment because the phrase "terrorism," upon which the plaintiffs relied, had a specific statutory definition which the plaintiffs had failed to allege.

The D.C. Circuit in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir 2004), addressed the level of detail with which material support must be alleged in a complaint. The Libyan defendants challenged the Court's subject matter jurisdiction under the terrorism exception by arguing that in order to support jurisdiction, the term "caused by" in § 1605(a)(7) required pleading a direct chain of events, from material support provided to the victim's injury. This is the exact challenge Sudan is asserting in this case. The Court concluded that Plaintiffs need not plead a "but for" causal link. For if courts were to impose a "jurisdictional requirement that a state sponsor's financial assistance to a terrorist organization must be *directly* traceable to a particular terrorist act" it would "likely render § 1605(a)(7)'s material support provision ineffectual." *Id.* at 1130 (emphasis in original). The reason for this is simple: "Money, after all, is fungible, and terrorist organizations can hardly be counted on to keep careful bookkeeping records." *Id.*

In *Owens v. Republic of Sudan, supra*, the plaintiffs made allegations of Sudan providing material support to Al Qaeda that are extremely similar to those pled in the present case. The district court found,

> "*Under any imaginable standard of pleading specificity*, these statements are sufficiently detailed to put the defendants on notice of the specific misconduct with which they are charged (and thereby to permit defendants to craft a reasonable response) and also to allow the Court to determine whether the alleged misconduct satisfies jurisdictional prerequisites."

Owens, 412 F.Supp.2d at 107 (emphasis added).

Sudan's assertion that the Fourth Circuit created a new, more lax "reasonable connection" test to substitute for the

statute's "caused by" language is incorrect. The Fourth Circuit held that Respondents "must include sufficient facts to support a reasonable inference that their claims satisfy the terrorist exception and, therefore, that an exercise of subject matter jurisdiction is appropriate." *Rux*, 461 F.3d at 468. "Imprecision is not fatal for purposes of jurisdictional causation so long as the allegations, and the reasonable inferences drawn therefrom, demonstrate a reasonable connection between Sudan's actions and the bombing." *Id.* at 474. The Fourth Circuit followed precedent from the District of Columbia Circuit[6], which has to date been the nearly exclusive forum for cases brought under the terrorism exception to the FSIA. The Fourth Circuit correctly points out that, while Respondents do not allege a direct and unbroken chain between Sudan's acts of support and the U.S.S. Cole bombing, the allegations and inferences drawn therefrom describe "how Sudan provided Al-Qaeda a base of operations to plan and prepare for the bombing, and provided operational support for the attack." *Id.* These allegations are sufficient to support causation for pleading purposes to establish subject matter jurisdiction.

Sudan, in a virtually hopeless effort to create the appearance of conflict, cites *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). In *Papasan v. Allain*, this Court discussed in passing one of the plaintiffs vague allegations that a school provided inadequate education. In *dicta*, the Court noted that it was not obligated to give credit to the plaintiffs' legal conclusions regarding the inadequacy of the education received, and that plaintiffs should have alleged actual facts in support of this assertion, such as they "are not taught to read or write" or "that they receive no instruction on even the educational basics." *Id.* at 286. This complaint in this case does not have a similar failure. The claims alleged regarding Sudan's support of Al Qaeda are

---

[6] *Kilburn, supra; Owens, supra; Price II, supra.*

not mere legal conclusions. Respondents allege an extensive list of Sudan's specific actions, which are exactly the kind of allegations suggested by the Court.

Sudan also relies on *Robinson v. Gov't of Malaysia*, 269 F.3d 133 (2d Cir.2001) regarding its claim of a need to make detailed evidentiary jurisdictional allegations. However, in *Robinson*, defendant Malaysia challenged the proof regarding the factual basis of the plaintiff's allegations. The matter under review was the evidence adduced in support of jurisdiction. Even so, the court in *Robinson* acknowledged that the standards to establish subject matter jurisdiction are not the same as those to prove the case on its merits, as Sudan's position would require. "A district court does not, of course, decide a case on the merits in order to decide if it has jurisdiction. '[J]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action.'" *Robinson*, 269 F.3d at 141, *quoting Bell v. Hood*, 327 U.S. 678, 682 (1946).

Finally, Sudan relies upon *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Sudan claims that the Fourth Circuit created "hypothetical jurisdiction," thereby allowing this case to proceed without determining whether subject matter jurisdiction exists. Sudan ignores the extensive discussion in *Steel Co.* that distinguishes the difference in pleading standards as opposed to standards of proof for a decision on the merits.

The Fourth Circuit's determination in this case was squarely within the parameters of the jurisdictional pleading standards discussed by Justice Scalia in *Steel Co.* In a discussion of the "irreducible constitutional minimum of standing," Justice Scalia described causation as "a *fairly traceable connection* between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co.*, 523 U.S.

at 102-103, *quoting Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41-42, (1976) (emphasis added). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Id.* at 89 (internal citations omitted). Sudan misinterprets the Fourth Circuit's decision. The Fourth Circuit did not rely on hypothetical jurisdiction. Rather, it followed this Court's precedent, and made a proper determination that subject matter jurisdiction exists in this case.

V. THIS COURT MAY TAKE JUDICIAL NOTICE OF SUBSEQUENT EVENTS AT THE TRIAL LEVEL WHICH MAKE REVIEW INAPPROPRIATE.

Developments in this case at the trial level subsequent to this appeal have an important bearing on Sudan's petition. "Judicial notice may be taken at any stage of the proceeding." Fed.R.Evid. 201(f). Therefore, for purposes of the instant appeal, this Court may take judicial notice of subsequent developments in this case at the trial level since the filing of this petition. *Bryant v. Carleson,* 444 F.2d 353, 357 (9th Cir. 1971). "We are ... free to take judicial notice of subsequent developments in cases that are a matter of public record and are relevant to the appeal." *Rothenberg v. Security Management Co., Inc.,* 667 F.2d 958, 961, n. 8 (11th Cir. 1982). *See also U.S. v. An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup,* 583 F.2d 942, 946, n. 3 (7th Cir. 1978) (taking judicial notice of administrative law judge's ruling which was impossible to include as part of the record because it was handed down only nine days before argument of the appeal).[7]

[7] Matters deemed admitted are conclusively established for all purposes in this litigation. Fed.R.Civ.P. 36(b). Facts which establish (Cont'd)

This Court should take judicial notice of the following events. The District Court has set this case for trial beginning March 13, 2007. On November 22, 2006, Plaintiffs served upon Sudan requests for admissions. Responses were due on December 22, 2006. Sudan did not serve any responses denying or objecting to the requests or seeking an extension of time. Sudan still has not served any responses. Therefore, under Fed.R.Civ.P. 36(a), Sudan is deemed to have admitted all of those matters contained in the request for admissions.

The facts admitted by Sudan are extensive and leave no doubt as to the existence of jurisdictional causation and the District Court's capacity to hear this case. By operation of Fed.R.Civ.P. 36(a), Sudan admitted that Al Qaeda is a worldwide terrorist organization whose operatives facilitated the planning and execution of the bombing of the U.S.S. Cole. Sudan also admitted that it provided material support or resources to Al Qaeda in the form of funding, direction, training or cover, and that officials, employees or agents of Sudan provided such support within the scope of their office, employment or agency. Sudan admitted that some of the actual perpetrators of the bombing of the U.S.S. Cole were allowed to train in Sudan and met there with Osama bin Laden. Additionally, Sudan admitted that it provided diplomatic credentials and passports to Al Qaeda members, and that providing diplomatic credentials allowed the holder

---

(Cont'd)

jurisdiction are properly subject to requests for admissions. *See Oroco Marine, Inc. v. National Marine Service, Inc.*, 71 F.R.D. 220, 222 (S.D.Tex. 1976)(facts establishing diversity of citizenship deemed admitted when no response was forthcoming after 30 days); *Khalili v. Pan Am Petroleum Corp.*, 49 F.R.D. 22 (D.Alaska 1969)(overruling objection to request for admission seeking to establish amount in controversy for jurisdictional purposes); *McGonigle v. Baxter*, 27 F.R.D. 504 (E.D.Pa. 1961)(overruling objection to request for admission seeking to establish party's state of citizenship for purposes of diversity jurisdiction).

greater freedom to travel and transport materials. Sudan admitted to providing economic assistance to Al Qaeda by waiving customs and import duties, and providing weapons and other military equipment to Al Qaeda in addition to assisting them in transporting weapons across international borders. Sudan admitted that it allowed Al Qaeda to keep boats at Port Sudan. Finally, Sudan admitted it jointly funded the Al Shamal Islamic Bank with Osama bin Laden, and that bin Laden and other Al Qaeda members held accounts there.

Since filing this Petition, Sudan, by ignoring the requests for admissions, admitted all of the facts which would be necessary to conclusively establish jurisdiction. Sudan's admissions confirm that the District Court was correct in ruling that Sudan was subject to suit under § 1605(a)(7). Sudan's admission of extensive facts establishing jurisdictional causation is yet another compelling reason this Court should deny its petition for writ of certiorari.

CONCLUSION

For the reasons stated above, Sudan's petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW C. HALL
Counsel of Record
MARK E. STEINER
HALL, LAMB AND HALL, P.A.
1428 Brickell Avenue, Penthouse
Miami, Florida 33131-3491
(305) 374-5030

JAMES COOPER-HILL
320 Olympic
Rockport, Texas 78382
(361) 729-3923

NELSON M. JONES, III
NICHOLAS & JONES, P.A.
440 Louisiana Street, Suite 475
Houston, Texas 77002
(713) 224-5323

MARY JANE HALL
KAUFMAN & CANOLES, P.A.
150 West Main Street, Suite 2100
Norfolk, VA 23510
(757) 624-3130

Counsel for Respondents

January 19, 2007